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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re K.Z., a Person Coming Under the Juvenile Court Law.	H033060 (Santa Clara County Super. Ct. No. JV32417)
THE PEOPLE, Plaintiff and Respondent, v. K.Z., Defendant and Appellant.	

A Welfare and Institutions Code section 602 petition alleged that, on or about March 15, 2008, K.Z. (the minor) committed felony assault with a deadly weapon, a knife, or by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).)[1] The petition further alleged that the minor personally used a deadly and dangerous weapon in committing the offense. (§§ 667, 1192.7.) The petition was subsequently amended to allege that the offense was committed for the benefit of, at the direction of, and in association with, a criminal street gang, with the specific intent to further and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1).) In addition, the amended petition provided notice of the intent to aggregate the minor's

[1] All further unspecified statutory references are to the Penal Code.

maximum potential term of confinement based on a January 18, 2007 petition for vehicle theft, receiving stolen property, misdemeanor hit and run and misdemeanor resisting arrest.[2]

After a contested jurisdictional hearing, the juvenile court sustained the petition as charged, found that the offense was a felony, and declared the minor to be a ward of the court. At the disposition hearing, the juvenile court found the minor's maximum term of confinement was nine years and ordered him committed to James Ranch for eight months. The court also imposed certain terms of probation, including that the minor not frequent any areas of gang related activity and that he not remain in any building, vehicle, or in the presence of any person where dangerous or deadly weapons exist.

On appeal, the minor argues that there was insufficient evidence to support the gang enhancement allegation, that certain of the probation conditions are unconstitutionally vague and overbroad, and that the juvenile court erred in failing to make clear that it was aware of and was exercising its discretion to designate the sustained offense as either a misdemeanor or a felony.

We find no merit to the minor's contention regarding the gang enhancement allegation. However, we agree that the probation conditions are overbroad as currently written and should be modified. We also agree that the record fails to establish that the juvenile court considered its discretion to designate the assault count as either a misdemeanor or a felony, and we shall therefore remand the matter.

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[2] A deferred entry of judgment suitability report from the probation department, filed on February 7, 2007, recommended that the minor be found unsuitable, noting that the minor failed to appear for an interview with the probation officer, and had apparently fled to Mexico to reside with his father. The January 18, 2007 petition was dismissed without prejudice on February 7, 2007, in the interests of justice. (§ 1385.)

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The prosecution case

At approximately 9:15 p.m., on March 15, 2008, 17-year-old Jose S. left work, riding a bus to Tilton Avenue and Hale Street in Morgan Hill, from whence he began walking home. A party was taking place at a house along Jose's route, and three males from that party approached Jose, asking if he was in a gang.[3] Jose replied, "No," and continued walking. Jose was nervous about this confrontation and called his parents, asking them to come pick him up.

Jose continued walking, and a "brownish and reddish" car pulled up behind him. The minor jumped out of the passenger seat of the car and swung a knife in Jose's face. Jose ducked, avoiding the knife. The minor asked if Jose remembered him and called out "Boots" and "VSR." Jose did not know the minor's name, but recalled that he had attended summer school with the minor several years earlier. Jose punched the minor in the face several times, then tried to run away. Two more passengers exited the rear seat of the car and joined the minor in chasing Jose down and surrounding him. Jose recognized one of these two passengers, later identified as G.C., as one of the three males who had previously confronted him outside the party.

One of the other two passengers was also armed with a knife, and after catching Jose, was able to stab him in the back and in the stomach. Jose fought back, though he was frightened and thought he would be killed. One of the passengers called out "VSR 13" several times during the altercation.

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[3] Jose testified he was not a member of a gang and was not wearing any gang-related colors or clothing that evening, though he was known to be friends with members of a Norteño gang. While he was not armed that night, Jose acknowledged that a juvenile petition had been sustained against him in September 2007 for assault with a deadly weapon after he threatened a man with a knife. Jose also acknowledged that twice in 2004, he called out "Norteño" as he walked out of his high school classroom.

The fight was taking place in the middle of the street, with cars passing by. One of the assailants said, "I stabbed him. Let's leave," and the minor, G.C., and the other male ran back to the car and drove off.

Jose's father arrived and contacted the police. Morgan Hill Police Officers Broyer and Ray interviewed Jose, who described the minor as approximately 5 feet 10 inches tall, with a light complexion, and wearing a black and white striped sweatshirt. Jose said the minor called himself "Boots." Jose also told police that the people who had attacked him had come from the party further down the street.

Jose was taken by ambulance to a local hospital and was treated for shallow puncture wounds to his back and stomach. Photographs of Jose's wounds and his ripped shirt were admitted into evidence. While at the hospital, Jose was shown a photographic lineup and, from that lineup, he identified the minor and G.C. as two of his attackers.

Officers Broyer and Ray drove to the house where the party was being held and saw about 50 people in the front yard and about 10 more people standing in front of the gate to the yard. The house was approximately 300 yards from the location where Jose was attacked. When the officers pulled up, the group of 10 people standing in front of the gate ran inside the residence.

Shortly after the officers arrived, the minor, who was wearing a black and white sweatshirt, left the house with a group of females and walked into a parking lot across the street. The minor was holding his head low and had his hand on the side of his face, as if he were trying to shield that part of his face from view. Officer Ray had previously worked as a school resource officer at Live Oak High School, and, in that capacity, had had several prior contacts with the minor regarding gang related violence. Because of those contacts, the officer knew that the minor's moniker or nickname was "Boots" and that he was known to associate with members of Vario Sur Rifa, or VSR, which is the predominant Sureño criminal street gang in Morgan Hill. Officer Ray called the minor's name, and the minor responded by turning and looking directly at the officer. Officer

Ray ordered the minor to the ground and took him into custody. None of the girls who had been walking with the minor asserted that the minor had been with them all night. When booked, the minor was found to have bruises and abrasions on his forehead, his stomach, his arm and his back. He also had a single dot tattooed on his right elbow and three dots tattooed on his left elbow.

Morgan Hill Police Corporal Melinda Zen qualified as an expert in Hispanic street gangs. At the time of the hearing, Corporal Zen had been a peace officer for approximately 10 years, and while at the police academy and in field training, spent approximately 40 hours in training devoted to Hispanic criminal street gangs. In the years since, she had undergone approximately 200 hours worth of gang training, and attended monthly meetings with the Santa Clara County Probation Department during which trends, "current investigations, [and] localized gang activity related to Hispanic gangs" were discussed. During her career, she has spoken to over 1000 gang members, investigated approximately 100 gang crimes and is the gang expert in the Morgan Hill Police Department. In that capacity, she reviews all gang cases that are investigated in the department and trains other officers in how to investigate and document gang crimes. Corporal Zen speaks Spanish and has conducted 20 to 30 home visits with family members, helping parents understand gang culture and teaching them what to look for in terms of their children's clothing and colors.

Corporal Zen testified that the two major Hispanic street gangs, the Norteños and the Sureños, each associate themselves with particular colors and numerals. Norteños associate with the color red and the numeral 14, which corresponds to the 14th letter of the English alphabet, "N." Sureños associate with the color blue and the numeral 13, which corresponds to the 13th letter of the English alphabet, "M."

According to Zen, VSR is a sub-group of the Sureños and is a criminal street gang active in several states as well as in Morgan Hill. The local group in Morgan Hill consists of approximately 10 to 15 active members and 10 to 15 associates. Zen stated

that, in her opinion, the VSR was an ongoing criminal street gang whose primary criminal activities were assault with a deadly weapon, robbery and auto burglary. In that portion of her direct examination by the People regarding VSR's activities, the following exchange occurred:

"Q. What would you consider the primary criminal activities or activities are [*sic*] the VSR to be?

"A. Well, it would be assaults, felony assaults, robberies some--

"Q. I'm going to stop you there. You mentioned . . . assault. Would that be just a simple assault or assault with a deadly weapon?

"A. Assault with a deadly weapon.

"Q. And you also mentioned robbery. Are those two crimes listed within Penal Code Section 186.22[, subdivision] (c) 1 through 33?

"A. Yes.

"Q. And you mentioned those two as being the primary activities. Are there any others?

"A. Yes. Auto burglaries."

Her opinion on this subject was based on the criminal convictions of VSR gang members, her own conversations with VSR members and on other officers' investigations of VSR members.

Zen further opined that the minor was an active member of the VSR criminal street gang at the time of the offense, based on the "dot" tattoos on his elbows which indicated allegiance to the Sureños, and a tattoo of two clown masks on his ankle. In addition, the minor admitted to the police in 2008 that he had been a Sureño for three years. Also in 2008, the minor was detained by the police in the company of two

admitted members of VSR, one of whom was codefendant G.C.[4] During this detention, the minor told police that his gang nickname or moniker was "Boots." In 2006, during an investigation of an incident at the minor's home, he was wearing a blue cap, a blue crucifix, a blue jacket and a blue belt with an "S" on the buckle.

Zen testified that it was her opinion that the instant offense was committed for the benefit of, at the direction of, or in association with the VSR criminal street gang because the assailants were VSR members, and the crime was committed to instill fear in the public as well as to gain respect and notoriety for VSR. According to Zen, the crime was "in association" with a criminal street gang since two or more VSR gang members were working together in the assault, and the crime benefitted VSR as it enhanced its reputation "on the street" because "[g]angs thrive on fear and respect."

With respect to VSR's primary activities, Zen testified regarding two crimes committed by validated VSR members. The first of these involved the conviction of Hector Farias for assault with a deadly weapon, namely a knife, in Gilroy on March 29, 2006. Farias and Geraldo Flores were in a car when they saw a man wearing a red hat walking on the sidewalk. Farias and Flores yelled Sureño gang calls, jumped out of the car and, after Farias told Flores to "get the knife," they stabbed the man and his female companion. A gang enhancement allegation was found to be true in Farias' case, and Farias had previously acknowledged to police that he was a VSR member, his moniker was "Tucan," and he had three dots tattooed on one elbow, one dot tattooed on the other elbow and "VSR" tattooed on his left hand. Certified copies of the complaint, the abstract of judgment, plea and sentencing minutes relating to this crime were admitted into evidence.

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[4] Zen expressed her opinion that G.C. was a VSR gang member based on his prior admission to being such a gang member, his admitted gang monikers "Brownie" and "Gerry," and his tattoos, which included a large "VSR" across his stomach, as well as one dot on one arm and three dots on the other.

The second predicate offense Zen described was Gabriel Pineda's 2004 conviction for auto burglary in Morgan Hill. Pineda had previously acknowledged that he was a member of VSR. Certified copies of the complaint, the sentencing minute order, the probation sentencing report, the plea minute order and a waiver of rights plea form relating to Pineda's crime were admitted into evidence.

B. The defense case

G.C.'s mother, Laura C., testified that G.C. and his brother were home on the night of the incident. She admitted that her sons had asked her for permission to go to a party somewhere in Morgan Hill that night, but she denied telling Corporal Zen that her sons left the house at 9:00 p.m. that night and did not know when they returned. Laura C. also denied telling Zen that her sons had "been out of control" for some time. She acknowledged that G.C. and the minor had been friends "since they were children." Laura C. also admitted that she had been previously convicted for possession of methamphetamine for sale.

The minor's girlfriend testified that the minor was with her at the party in Morgan Hill on the night in question, though the minor arrived at 8:30 p.m., several hours after she got there. The girlfriend testified that she was inside the house the entire time, until the party was cancelled, at which time she and the minor walked to the parking lot across the street. On cross-examination, however, she testified that she went outside to greet the minor when he arrived and they remained outside together. The girlfriend said that G.C.'s brother was also at the party, but left before the minor arrived. When the minor was arrested, she did not approach any of the police officers and ask why he was being arrested.

C. The prosecution's rebuttal

Corporal Zen testified that she spoke with Laura C. on March 17, 2008, and that she did say that her sons were out of control and had been for some time. Laura C. also told her that G.C. and her other son left the house at 9:00 p.m. on the evening of March

15, 2008, to go to a party in Morgan Hill. When they were not home at 11:00 or so, she called them and told them to come home, but fell asleep and did not actually see them again until the following morning.

D. The juvenile court's ruling and disposition

The juvenile court announced its ruling as follows:

"The Court has considered all of the evidence that's been presented over the course of the past four days that we've been in trial in this proceeding. And I did take ample opportunity last night to review each of the exhibits. . . . [T]he Court also conferred with the appropriate jury instructions and reviewed some of the reporter's transcript on testimony that was given on various issues. [¶] After weighing and considering all of the evidence, the Court is going to make the following findings: First of all, the preliminary findings that the notice of this hearing has been given as required by law. Secondly, that . . . as to each minor, that the date of birth is correctly stated on the petition and that each is a resident of this county. [¶] . . . [¶] . . . [W]ith respect to the petition B against [the minor], that the allegations in the petition are true and have been proved beyond a reasonable doubt. That each minor[5] is as described in section 602 of the Welfare and Institutions Code. The Court will also make a finding that the enhancements of the allegation in the petition are proved to be true. . . . [E]ach of the offenses or the offense that's alleged in the petition if [it] had been committed by an adult, the offense would have been a felony. And the Court is sustaining these allegations in the petition against each minor as a felony."

At the subsequent disposition hearing on June 6, 2008, the juvenile court ordered the minor removed from the custody of his parents and committed to a ranch program for a period of six to eight months. The maximum term of confinement was set at nine years

[5] In the same proceeding, the juvenile court sustained a separate petition against G.C.

and the minor was awarded 64 days credit. The juvenile court also imposed various probation terms and conditions, including that the minor "not frequent any areas of gang related activity and not participate in any gang activity," and that the minor "not remain in any building, vehicle, or the presence of any person where dangerous or deadly weapons exist."

II. DISCUSSION

A. Gang enhancement

The minor challenges the juvenile court's finding regarding the gang enhancement, claiming that, during her testimony, Corporal Zen offered an opinion only as to what she considered VSR's primary *criminal* activities to be. Relying principally on *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*), the minor urges that this evidence was not sufficient to show, as required under section 186.22, subdivision (f), that one of VSR's "primary activities" was the commission of one or more of the felonies enumerated under section 186.22, subdivision (e).

1. Standard of review

In determining whether the evidence is sufficient to support a finding in a juvenile court proceeding, the reviewing court is bound by the same principles as to sufficiency and the substantiality of the evidence which govern the review of criminal convictions generally. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.) These principles include the following: "It is the prosecution's burden in a criminal case to prove every element of a crime beyond a reasonable doubt." (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) The appellate court, in examinng whether the prosecution has introduced sufficient evidence to meet this burden, must determine " 'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.' " (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13.) In making this determination, "[the appellate court] must examine the whole record in the light most favorable to the judgment to determine

whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

2. Sufficiency of the evidence to support gang enhancement allegation

A gang enhancement allegation requires proof that the perpetrator of a crime committed it "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1); *People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.) Section 186.22, subdivision (f) defines "criminal street gang," as follows: "[A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, *having as one of its primary activities the commission of one or more of the criminal acts* enumerated in paragraphs (1) to (25), inclusive, . . . of [section 186.22,] subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Italics added.)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the [28 crimes enumerated in section 186.22, subdivision (e)] is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) In determining the "primary activities" element, the factfinder may consider evidence of past and present conduct of gang members consisting of any of the enumerated offenses. (*Ibid.*; *People v. Galvan* (1998) 68 Cal.App.4th 1135, 1140.)

Proof of the existence of a criminal street gang may be established through expert testimony. (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 324.) In this case, evidence

in support of the "primary activities" element was offered through the expert testimony of Corporal Zen, discussed in some detail above. Citing *Alexander L.*, the minor contends that since Corporal Zen failed to specifically opine that VSR's primary activities involved the commission of qualifying criminal offenses, there is insufficient evidence that VSR is a criminal street gang under section 186.22, subdivision (f).

In *Alexander L.*, *supra*, 149 Cal.App.4th 605, the gang enhancement was based upon testimony of a gang expert who, when asked about the gang's primary activities, responded " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' " (*Id.* at p. 611.) The expert did not explain the basis for his knowledge or provide the details of any particular crimes, nor did he "directly testify that criminal activities constituted [the gang's] primary activities." (*Id*. at p. 612.) The appellate court noted, "[e]ven if we could reasonably infer that [the gang expert] meant that the primary activities of the gang were the crimes to which he referred, his testimony lacked an adequate foundation." (*Ibid*.) Consequently, the appellate court concluded that there was insufficient evidence that the "primary activities" prong essential to proving the existence of a criminal street gang had been established. (*Id.* at pp. 611-612.)

Corporal Zen's testimony on this subject appears at first glance to be equivocal, principally because the question she was asked, i.e., "What would you consider the primary criminal activities or activities are [*sic*] the VSR to be?" was awkwardly phrased. It is not clear whether this question is asking Corporal Zen to identify VSR's primary *criminal* activities in particular or its primary activities in general. The intent of the question, however, is clarified almost immediately thereafter when Corporal Zen is asked to identify any other "primary activities" of VSR, to which she responds, "Auto burglaries." Based on this exchange, it is reasonable to infer that Corporal Zen was asked about VSR's "primary activities" in general as opposed to specifically about its "primary

criminal activities" and was thus stating her opinion that VSR's primary activities consisted of the criminal acts she listed.

Unlike the testimony offered by the gang expert in *Alexander L.*, Corporal Zen's testimony was supported both by evidence establishing her expertise in the investigation of gang crimes,[6] as well as documentary evidence of two specific gang crimes committed by VSR members prior to the commission of the charged offense. In addition to the two prior gang crimes, the charged assault with a deadly weapon--which Corporal Zen, based upon substantial evidence, opined was a gang-related attack by VSR members against a perceived Norteño--could also have been considered in finding that one of the primary activities of VSR was the commission of one or more of the offenses enumerated in section 186.22, subdivision (e). (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 323.) The circumstances involved here are dissimilar to those presented in *Alexander L.*, and we conclude that there was sufficient evidence presented in this case to support the gang enhancement.

B. The probation conditions

The minor objects that two of the probation conditions imposed on him, namely that he "not frequent any areas of gang related activity and not participate in any gang activity," and that he "not remain in any building, vehicle, or the presence of any person where dangerous or deadly weapons exist" are unconstitutionally vague and overbroad. The People concede that the conditions are defective and suggest that the defects can be overcome by adding the word "knowingly" to each condition. In his reply brief, the minor argues that adding the word "knowingly" is insufficient to cure the defective

[6] To reiterate, Corporal Zen had 10 years of experience as a police officer; held an assignment emphasizing gang crime; had been personally involved in gang investigation training of other officers; and had investigated approximately 100 gang crimes, including the instant offense. Indeed, the minor's counsel did not object to her qualifications as a gang expert. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463 [noting that the defendant did not challenge gang expert's qualifications].)

condition prohibiting him from "frequenting areas of gang related activity," since the People's gang expert testified that gang activity is widespread throughout the state.[7]

Conditions of probation have been upheld even though they restrict a probationer's exercise of constitutional rights so long as the conditions are narrowly drawn to serve the important interests of public safety and rehabilitation (*People v. Keller* (1978) 76 Cal.App.3d 827, 839, disapproved on other grounds by *People v. Welch* (1993) 5 Cal.4th 228, 237) and are specifically tailored to the individual probationer. (*People v. Smith* (2007) 152 Cal.App.4th 1245, 1250.) A probation condition suffers from constitutionally fatal overbreadth where it is not sufficiently narrowly drawn. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 628-629 (*Lopez*).) An example is a condition that prohibits associating with gang members who are not known to be gang members or displaying gang indicia that are not known to be gang related. (*Ibid.*) The concept of unconstitutional vagueness is related to the concept of unconstitutional overbreadth and distinctly focuses on fair notice of what conduct is proscribed. (*Id.* at p. 630.)

Absent a requirement that the minor know he is disobeying the condition prohibiting him from frequenting "any areas of gang related activity," he is vulnerable to punishment for an unwitting violation of it. (See *Lopez*, *supra*, 66 Cal.App.4th at pp. 628-629; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816.) We agree that this probation condition is constitutionally overbroad because it lacks an explicit knowledge requirement and also because it is impermissibly vague in that it does not provide notice of what areas the minor may not frequent. As currently phrased, the condition renders the minor vulnerable to criminal punishment for frequenting areas he does not know are

[7] The minor does not challenge the People's concession that addition of a knowledge requirement would cure any constitutional defect associated with the condition that "he not remain in any building, vehicle, or the presence of any person where dangerous or deadly weapons exist," and therefore, we will accept the People's concession and modify the probation condition accordingly.

areas of gang-related activity. (See *Lopez*, *supra*, at pp. 628-629.) Furthermore, even with a knowledge requirement, the travel condition is not sufficiently precise for the minor to know what is required of him. (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.)

These constitutional defects of overbreadth and vagueness may be cured by also including the proviso, "as directed by the Probation Officer." That phrase would satisfy the knowledge requirement that was missing in *Lopez* and avoid vagueness concerns because the minor could be found in violation of the condition only if he had been specifically advised by his probation officer as to what locations are off limits. Therefore, rather than strike the condition and remand for the court's reconsideration, we shall modify it to include the word "knowingly" and the phrase, "as directed by the Probation Officer." (See *In re Justin S.*, *supra*, 93 Cal.App.4th at p. 816.)

C. Designation of the offense as a misdemeanor or felony

Finally, the minor contends that the juvenile court failed to exercise its discretion to determine whether the offense was a felony or misdemeanor pursuant to Welfare and Institutions Code section 702, and therefore the matter must be remanded for clarification and possible recalculation of the maximum period of physical confinement.

Welfare and Institutions Code section 702 provides that in a juvenile proceeding, "[i]f the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." This language "is unambiguous" and its "requirement is obligatory . . . ." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 (*Manzy W.*).) The statute "requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult." (*Ibid.*)

The required declaration as to misdemeanor or felony may be made at the contested jurisdictional hearing or at the dispositional hearing. (Cal. Rules of Court, rules 5.780(e)(5), 5.790(a)(1), 5.795(a).)[8] "If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and *expressly declare on the record that it has made such consideration*, and *must state its determination* as to whether the offense is a misdemeanor or a felony." (Rule 5.780(e)(5), italics added; see also rules 5.790(a)(1), 5.795(a).) The court's determination must also be noted in an order or in the minutes from the hearing. (Rules 5.780(e), 5.795(a).)

The significance of an express declaration under Welfare and Institutions Code section 702 was explained by the California Supreme Court in *Manzy W.*, *supra*, 14 Cal.4th 1199. Among other things, the California Supreme Court pointed out that a minor may not be held in physical confinement longer than an adult convicted of the same offense. (*Id.* at p. 1205; Welf. & Inst. Code, § 731, subd. (c).) Requiring the juvenile court to declare whether an offense is a misdemeanor or felony "facilitat[es] the determination of the limits on any present or future commitment to physical confinement for a so-called 'wobbler' offense." (*Manzy W.*, *supra*, at p. 1206.) Further, "the requirement that the juvenile court declare whether a so-called 'wobbler' offense [is] a misdemeanor or felony also serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702." (*Id.* at p. 1207.)

Remand is not required in every case when the juvenile court fails to make a formal declaration under the statute. "The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.) In *Manzy W.*, the California Supreme Court ultimately concluded

[8] All further rule references are to the California Rules of Court.

that the matter before it should be remanded to the juvenile court for an express declaration pursuant to the statute and possible recalculation of the maximum period of physical confinement. (*Id.* at p. 1211.) The California Supreme Court found "[n]othing in the record establish[ing] that the juvenile court was aware of its discretion to sentence the offense as a misdemeanor rather than a felony," and "it would be mere speculation to conclude that the juvenile court was actually aware of its discretion in sentencing Manzy." (*Id.* at p. 1210.)

In this case, the People alleged in count 1 that the minor committed an assault, which is punishable either as a misdemeanor or a felony. (§§ 17, 245, subd. (a)(1).) The People argue that the juvenile court's declaration on the record that the alleged offense, if it had been committed by an adult, would be a felony, is sufficient. We disagree.

The juvenile court is required to *expressly declare* on the record that it has *considered* whether the offenses would be misdemeanors or felonies and to *state its determination* in this regard. (Rules 5.780(e)(5), 5.795(a).) Here, while the juvenile court did expressly state its determination that the assault charge, if committed by an adult, would be a felony, at no time did the court expressly declare that it had considered whether the offense would be a misdemeanor or a felony. Furthermore, there is nothing in the record to suggest that the juvenile court undertook such a consideration.

For example, the probation officer's report does not indicate that the offense may be treated as a misdemeanor or a felony, nor does the report include a specific recommendation that references Welfare and Institutions Code section 702, rule 5.780(e)(5), rule 5.790(a)(1) or rule 5.795(a). Consequently, the report does not establish that the probation officer was aware of the court's discretion to treat the offense as a misdemeanor or a felony, let alone make any recommendation on that matter to the court.

In addition, the June 6, 2008 disposition order, which consists in part of a Judicial Council form, contains a section where the court may list specific counts and code sections which "may be considered a misdemeanor or a felony." For each such count,

there are two check boxes, one labeled "Misdemeanor," the other "Felony." In the instant case, this entire section has been left blank, which suggests that the court was not aware of and thus perhaps did not exercise its discretion in this regard at the dispositional hearing. Though the order does indicate that the court had previously found the minor to have violated section 245, subdivision (a)(1), with a notation of "FEL[ONY]," there is nothing to suggest that this reference to a felony reflects an exercise of discretion by the juvenile court since the charging document itself lists the offense as a felony.

In the absence of an express declaration that the juvenile court considered whether the offense would be a misdemeanor or a felony, we will remand the matter to the juvenile court for clarification.

III. DISPOSITION

The gang conditions of probation are modified to read as follows:

"18. That the minor not knowingly frequent any areas of gang related activity as directed by the Probation Officer and not knowingly participate in any gang activity;

"19. That the minor not own, use, or possess any dangerous or deadly weapons and not knowingly remain in any building, vehicle, or the presence of any person where dangerous or deadly weapons exist."

The juvenile court's dispositional order is reversed, and the matter is remanded for the limited purpose of permitting the juvenile court to consider whether the offense would be a misdemeanor or a felony and to make the express declarations required by Welfare and Institutions Code section 702, as well as California Rules of Court, rules 5.780(e)(5), 5.790(a)(1), and 5.795(a). If the juvenile court elects to treat the offense as a misdemeanor, it shall recalculate the maximum time of confinement. Otherwise, it shall declare the offense to be a felony and reinstate its original order, incorporating the probation conditions as modified above.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.